an insane mind is incapable, is a necessary ingredient of these actions, and that presumptively publications from such a source do not injure. On these grounds the Court of Appeals of Kentucky has recently added another decision to the American group. *Irvine* v. *Gibson*, 77 S. W. Rep. 1106.

It is submitted, however, that neither the English *dictum* nor the American doctrine is satisfactory. The liability should not be absolute, nor the defense complete. It is true, malice is usually regarded as essential to libel or slander, but that has come to mean merely "legal malice," which is inferred from the voluntary act.[6] So here again the only reason an insane person should escape is the absence of volition, and it has been seen that that is no defense under the general rule. Even if actual malice were required, however, it is hard to comprehend, as has been said, why public policy may not as well dispense with this as with the necessity of volition. Of course the absence of intent and of malice is always important to prevent punitive damages.

The second reason given for the American attitude is more important. Undoubtedly there is a presumption that the vaporings of a diseased brain do not injure, yet this is not always true. The public may be ignorant of the insanity, or it may be such that the words still have some weight.[7] The presumption that such utterances are not damaging should be a rebuttable presumption, not an absolute one. In ordinary slander, this would leave only the usual burden on the plaintiff, but where an action is maintainable without proof of damage, as in assault, libel, and slanderous words actionable *per se*, it would do away with that exemption, and make it necessary for the plaintiff to show some actual damage before he could succeed. Only when no actual damage can be shown, should the defense be complete.

CONTRACTS IN RESTRAINT OF TRADE WITHIN THE SHERMAN ANTI-TRUST LAW. — Probably no current legal question is of such importance to the business world as the meaning of the first section of the Sherman Anti-Trust Law which forbids "every contract, combination . . . or conspiracy, in restraint of trade" among the states. It seems a hopeless effort to attempt to spell out of the mass of federal decisions any serviceable and yet entirely uniform interpretation. At the beginning two positions at least were open to the courts. They might, first, have taken the conservative view that the statute forbids only those unreasonable contracts in restraint of trade which are invalid at the common law.[1] There is good reason to believe that this interpretation of the statute is what the framers had in mind.[2] Viewed in this light, the act merely adds a new federal remedy against the making of contracts in restraint of interstate trade, making penal what before was simply invalid. The opinion has been advanced that all, or nearly all, the cases can be sustained, as decisions on the facts, by this interpretation. But in at least one leading case, dealing with interstate carriers, the Supreme Court held bad a seemingly reasonable traffic agreement, the ground of invalidity being, apparently, that it did away with competition.[3] At common

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[6] Bromage *v.* Prosser, 4 B. & C. 247, 253.
[7] See Dickinson *v.* Barber, 9 Mass. 225; Yeates *v.* Reed, 4 Blackf. (Ind.) 463.

[1] See Rousillon *v.* Rousillon, 14 Ch. D. 351.
[2] Cong. Rec. xxi, pt. 4, pp. 3146, 3148.
[3] U. S. *v.* Trans-Missouri Freight Association, 166 U. S. 290.

law, however, it does not necessarily make a contract invalid that it does away with competition.[4]

In the second place, the courts could say that the act applies to every contract in restraint of trade, reasonable or unreasonable. Whatever may be the state of the cases as decisions on the facts, it is not to be denied that that is the result of the language and reasoning of the opinions.[5] That it was an unfortunate view to take, the decisions of the courts are already demonstrating. When confronted by an ordinary factor's agreement in what would seem obvious restraint of interstate commerce they have held it good, attempting to draw distinctions between direct and incidental restraint, which, if they mean anything, mean the application of the old common law test. Such was the case of the recent decision in *Phillips* v. *Iola Portland Cement Co.*, 125 Fed. Rep. 593 (C. C. A., Eighth Circ.). Here it was agreed between a vendor in Kansas and a vendee in Texas that the latter would not compete with his vendor anywhere beyond the boundaries of the state of Texas. In holding the agreement not within the provisions of the Sherman Act the court said the law must have a reasonable interpretation, and in trying to reach this interpretation it laid down a test of validity that might well have been adopted by a court applying the common law doctrine of reasonableness.

No one, of course, can foretell what the final outcome of the effort to fix the meaning of the Act will be. But one or two things are fairly clear. The courts will prove unwilling to adhere in all cases to the extreme language of the decisions which would make invalid any and every contract in restraint of interstate trade.[6] It is likely, moreover, that the discretion they exercise will follow more and more the old common law test of reasonableness with regard to all parties concerned, for there is no sound basis for discretion except reasonableness.

LIABILITY OF RAILROAD COMPANY TO PASSENGERS FOR NEGLIGENCE OF CONNECTING COMPANY. — There is much conflict among the authorities as to whether a carrier selling a ticket for a journey to begin on its own line and to terminate on a connecting line is liable for injuries received by the passenger on the connecting line. In England it is held that the carrier is so liable,[1] but most American courts take the view that it is not,[2] unless special circumstances are found from which it may be inferred that the carrier selling the ticket assumes responsibility for the other's negligence. But there is no doubt that a carrier is subject to such liability, if it actually so contracts; power to enter into contracts for the safe carriage of passengers on connecting lines is implied in the charter of every railroad company, so that these agreements are not *ultra vires*.[3] Furthermore, a carrier may sometimes be held liable for an injury received on a connecting line by a passenger who began his journey on that line, but who held a

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[4] Nordenfelt *v.* Maxim Nordenfelt, etc., Co., [1894] A. C. 535.
[5] U. S. *v.* Trans-Missouri Freight Association, *supra*.
[6] See discussion of Northern Securities Co. *v.* U. S. *ante*, p. 474.

[1] Great Western Ry. Co. *v.* Blake, 7 H. & N. 987.
[2] Knight *v.* Portland, Saco, & Portsmouth R. R. Co., 56 Me. 234; *contra*, Little *v.* Dusenberry, 46 N. J. Law 614.
[3] Wheeler *v.* San Francisco & Alameda R. R. Co., 31 Cal. 46.